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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 332

FENELON BOESCHE, ADMINISTRATOR OF THE ESTATE OF F. W. C. BOESCHE, Deceased,
Petitioner

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,
Respondent

On Writ of Certiorari To the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (R. 27-29) is reported at 303 F. 2d 204 (1962). The findings of fact and conclusions of law of the United States District Court for the District of Columbia (R. 22-25) are unreported. The main decision of the Department of the Interior (R. 15-18) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 16, 1961 (R. 29). The order of the Court of

Appeals granting petitioner's petition for rehearing en banc and vacating the Court's judgment of November 16, 1961 was entered February 21, 1962 (R. 35). The order of the Court of Appeals reinstating the November 16, 1961 judgment was entered June 15, 1962 (R. 36). The petition for writ of certiorari was filed on August 14, 1962, and granted on November 5, 1960 (R. 37). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) (1948).

QUESTION PRESENTED

Whether the Secretary of the Interior has authority under Section 31 of the Mineral Leasing Act, as amended, to cancel oil and gas leases by administrative action, for failure to comply with the Department's regulations.

STATUTES AND REGULATION INVOLVED

The pertinent provisions of the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, as amended by the Act of August 8, 1946, 60 Stat. 956, Section 441 of the Revised Statutes (1875), and 43 CFR 192.42(d) are set out in the Appendix, *infra* pp. 34-35.

STATEMENT

On September 11, 1956, petitioner's father, F. W. C. Boesche, deceased, filed application for an oil and gas lease (NM 027951) on an 80 acre tract of public land. On that date, an adjoining 40 acre tract was already under application for lease previously filed by Thomas Connell. Also on September 11, 1956, but later in the day, Vincent Cuccia and George E. Conley filed their joint application for a lease on both the 40 acres already applied for by Connell and the 80 acres already applied for by Boesche.

Accordingly, as of the close of business at the Santa Fe Land Office on September 11, 1956, the 40 acre parcel was under application by Connell as the first applicant for that parcel, the 80 acre parcel was under application for lease by Boesche as the first applicant for that parcel, and both parcels were under later application for lease by Cuccia and Conley. Thereafter, and in the following order, the Manager of the Santa Fe Land Office (1) on December 1, 1956 issued a lease on the 40 acre parcel to Connell,[2] (2) on December 1, 1957 issued a lease on the 80 acre parcel to Boesche, (3) by decision of January 24, 1958 [1] rejected Cuccia and Conley's application for a lease on the 80 acres already leased to Boesche.

Cuccia and Conley appealed from the Manager's decision to the Director of the Bureau of Land Management. By decision of January 9, 1959 (R. 12-14) the Director reversed the Manager's decision, holding that the Manager erred in issuing the Boesche lease and that the Boesche lease should be cancelled for failure to comply with 43 CFR 192.42(d).

Boesche then appealed to the Secretary of the Interior, who, through his Deputy Solicitor rendered a decision on August 5, 1959 (R. 15-18), affirming the Director's decision and directed cancellation of the Boesche lease. The reason given by the Secretary for this action is that Boesche failed to file for the adjoining 40 acres already covered by the Connell application and therefore violated the Department's regulation, 43 CFR 192.42(d), which requires, inter alia, that a lease offer must include a minimum of 640 acres unless the land applied for is surrounded by lands not available for leasing under the Act.

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[1] (R.11).

[2] On January 17, 1957, following the issuance of the lease to Connell, Cuccia and Conley withdrew their application as to the 40 acre parcel. Hence only the 80 acre parcel remained in their application.

Petitioner filed timely suit in the United States District Court seeking judicial review of the Secretary's decision.

The Petitioner alleged in the District Court that there had been no failure by Boesche to comply with the Department's 640 acre regulation. For at the time petitioner Boesche filed his application for the 80 acre tract, the adjoining 40 acre tract had already been applied for by one Connell. Since Connell had a statutory preference right by virtue of his prior application, the Connell 40 acre tract was not available for leasing by Boesche, and the Department did in fact later issue Connell a lease to the 40 acre tract. Thereafter, with full knowledge of the Cuccia-Conley conflicting application, the Department determined that petitioner Boesche was the first qualified applicant for the 80 acre tract and issued a lease to him. Petitioner further alleged that the Department's construction of the 640 acre regulation which served as the basis for the proposed cancellation of the Boesche lease was unsupported by the language of the regulation. The Department's construction of the 640 acre regulation would have required Boesche to perform the idle and superfluous act of top-filing Connell's 40 acre application and to invest a rental sum on a remote speculation that the prior and preferential application by Connell would be rejected or withdrawn. Petitioner stated that in the circumstances of this case it was readily apparent that the Department's construction of the so-called "640 acre" regulation was unreasonable and inappropriate because the Connell application was neither rejected or withdrawn prior to the issuance of the Boesche lease, and that in point of fact, the Department had issued a lease to Connell one year prior to the proposed cancellation of the Boesche lease. This construction of the regulation, moreover was applied after the Department had already determined that Boesche was the first qualified applicant for the Boesche 80 acre tract and after the Department had already issued a lease to Boesche. Petitioner further contended that the Secre-

tary had no statutory authority to cancel his lease; that the authority of the Secretary to cancel leases administratively had been specifically limited by the Congress to instances where:—

1. There is a violation of lease provisions by the lessee and,
2. Until such time as the lands covered by the lease are known to contain valuable deposits of oil and gas.

Petitioner pointed out that there had been no violation of the lease provisions by the lessee Boesche which would warrant administrative cancellation of the lease. Moreover, since the land involved was declared by the Geologic Survey to be within a known geologic structure some two months prior to the Secretary's decision to cancel the Boesche lease—the Secretary's decision to cancel was too late and would violate and be contrary to the express provisions of the governing statute.

By Judgment dated November 23, 1960, the District Court affirmed the Secretary's determination that Petitioner had failed to comply with 43 CFR 192.42(d) and upheld the authority of the Secretary to cancel Petitioner's lease by administrative action (R. 22-26).

The Petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit. By per curiam opinion dated November 16, 1961, the Circuit Court affirmed the decision of the District Court sustaining the Secretary's action authorizing cancellation of Petitioner's lease. The Court upheld the Secretary's determination that Petitioner had failed to comply with the Department's regulation 43 CFR 192.42(d) and upheld the Secretary's authority to cancel Petitioner's lease. Petitioner's petition for a Rehearing *en banc* was granted by Order of February 21, 1962, of the District of Columbia Circuit and the November 16, 1961 judgment of the Division was vacated and set aside. After the Rehearing

en banc, the Court *en banc* by per curiam order reinstated the November 16, 1961 judgment of the division.

In affirming the decision of the District court, the circuit court below held that the construction by the Secretary of his 640 acre regulation was "reasonable" and "should not be rejected". The court further stated "This court has held that the Secretary not only has authority to cancel a lease issued on a defective application but may be required to do so. *McKay* v. *Wahlenmaier*, 96 U.S. App. D.C. 313, 226 F. 2d 35 (1955)."

SUMMARY OF ARGUMENT

The Court of Appeals erred in affirming the District Court's decision upholding the Secretary's authority to cancel petitioner's lease.

A.1. The Secretary of the Interior has no authority under the Mineral Leasing Act of 1920 to cancel petitioner's lease administratively for alleged failure to comply with a Departmental regulation. Section 31 of the Act in its original form expressly provided that cancellation of leases should be by court proceedings in a United States District Court for the district in which the land or any part thereof is located.

2. Section 31 of the Act, as amended in 1946, conferred limited authority on the Secretary to cancel leases "upon failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas . . ."

3. There was no violation by petitioner of any of the lease provisions. Moreover, some two months prior to the Secretary's order to cancel petitioner's lease the land was determined by the Department to be on a known geological structure. Attempted administrative cancellation after

this determination would be contrary to the express provisions of the 1946 amendment to Section 31 of the act.

4. Had Congress intended that the Secretary have authority to cancel leases administratively, it would have expressly provided for such authority, as it did in Section 26 of the Act with respect to prospecting permits. For in Section 26 Congress provided, "That the Secretary . . . may exercise the authority to cancel any prospecting permit upon failure by the permittee to exercise due diligence in the prosecution of the prospecting work in accordance with the terms and conditions stated in the permit . . ."

B.1. The legislative history of the Mineral Leasing Act of 1920 clearly shows that Congress intended that cancellation and forfeiture of leases should be accomplished only by judicial proceedings in a United States district court. This was the understanding not only of both Chairmen of the House and Senate Public Land Committees as expressed in statements by them on the floors of the House and Senate, but it was also the understanding of the then Secretary of the Interior. In his report dated January 3, 1916 to the Chairman of the House Public Land Committee on the pending legislation, Secretary of the Interior Lane stated that the bill required judicial proceedings to effect forfeiture of leases. He also observed that this requirement was designed to protect the rights of lessees.

2. The legislative history of the act discloses, moreover, that an attempt on the floor of the House of Representatives to amend the bill to provide that leases could be cancelled by the Secretary of the Interior was defeated.

C.1. The Secretary's 1930 construction of the Mineral Leasing Act of 1920, in *Melish Consolidated Placer Oil Mining Company* v. *Testerman, et al.*, 53 I.D. 205 (Nov. 7, 1930) squarely states that "The lease once granted was beyond recall by the Secretary and is only subject to can-

cellation in the Federal Courts (Sec. 31, act of February 25, 1920)."

D.1. Shortly after the Secretary's disclaimer of authority to cancel leases, in the *Melish* case, *supra*, the Court of Appeals for the District of Columbia Circuit, in *Bell Oil & Gas Co.* v. *Wilbur*, 64 App. D.C. 256, 50 F. 2d 1070, 1071 (1931) held that "The Secretary, under the terms of the Act, has no power by his own fiat to cancel leases. He is required to go into the District Court of the United States to accomplish that result by a proceeding in equity."

2. The 1946 amendment to Section 31 of the Mineral Leasing Act[3] expressly confers a limited authority on the Secretary to cancel leases for failure on the part of the lessee to comply with the lease provisions. That Congress considered it necessary to confer this limited power on the Secretary, some 26 years after enactment of the Mineral Leasing Act, tends to buttress the earlier view of the Secretary in the *Melish* case, *supra*, and that of the Court of Appeals in *Bell Oil & Gas Co.* v. *Wilbur*, *supra*, to the effect that the Secretary had no authority to cancel leases administratively after the lease had issued.

3. However, the 1955 decision of the Court of Appeals for the District of Columbia Circuit, in *McKay* v. *Wahlenmaier*,[4] expressed the view that the Secretary had the authority and duty to cancel leases administratively for failure to comply with Departmental regulations.

4. Subsequently, in its opinion of October 3, 1957, the Court of Appeals for the District of Columbia Circuit in *Seaton* v. *The Texas Company* and *Snyder* v. *The Texas Company*,[5] implicitly critized its earlier decision in the

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[3] August 8, 1946, sec. 9, 60 Stat. 956, 30 U.S.C. 188.

[4] 226 F. 2d 35 (1955).

[5] This opinion being unreported is printed in the appendix at pp. 36-43

Wahlenmaier case, *supra*, and squarely held that the Secretary had no authority under the Mineral Leasing Act to cancel a lease issued to a Mr. Dorough. The opinion held moreover that such authority could not be implied. The Court equated a lease to a patent, which under long established decisions of the Supreme Court could only be cancelled by appropriate court proceedings. This opinion of the Court was withdrawn on rehearing and in a second opinion[6] the court set aside the Secretary's cancellation of Dorough's lease on the more limited ground that the Secretary's "cancellation was not permissable as valid administrative action."

5. In 1960, the United States Court of Appeals for the Tenth Circuit, in *Pan American Petroleum Corporation* v. *Pierson*, 284 F. 2d 649 (1960), held that the Secretary had no statutory authority to cancel leases administratively after its issuance except for the lessee's breach of the lease provisions. The Secretary's petition for Writ of Certiorari in this case was denied by this court on May 29, 1961.

6. Under the "patent" cases, this court established a clear line of demarcation between the powers of the Executive branch on the one hand and those of the Judicial branch on the other hand with respect to cancellation of patents and other "like instruments".[7] These cases firmly establish the principle that after a patent or "like instrument" had been issued, the Department could not reconsider its action.[8] Cancellation or forfeiture of these instruments could be accomplished only by judicial proceedings in an appropriate court.[9] Upon conveyance of

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[6] 226 F. 2d 718.

[7] *Johnson* v. *Towsley*, 80 U.S. 72 (1871).

[8] *West* v. *Standard Oil Co.*, 278 U.S. 200 (1929).

[9] *Moore* v. *Robbins*, 96 U.S. 530 (1877).

title the grantee was vested with a property right which could not be taken from him without court proceedings. An administrative attempt to do so would be to deprive him of his property without due process of law.[10]

E.1. In enacting Section 31 of the Act, providing that forfeiture and cancellation of leases should be accomplished by court proceedings, Congress was giving statutory effect to the jurisdictional line of demarcation between the Executive and Judicial branches already established by this court in the "patent" cases.

F.1. The Secretary's assertion of implied authority under Section 441 of the Revised Statutes of 1875, to cancel leases administratively, the express provision of Section 31 of the Mineral Leasing Act of 1920 notwithstanding, cannot be sustained in view of this court's holding in *Youngstown* v. *Sawyer*, 343 U.S. 579 (1952). This case stated the principle that executive power may not be implied to support a course of action contrary to specific procedures provided by statute.

2. Section 37 of the Act provides that "the deposits of coal, phosphate, oil, oil shale and gas . . . shall be subject to disposition only in the form and manner provided by this act . . ." The Secretary's assertion of implied power under Section 441 of the Revised Statutes of 1875 is clearly contrary to the statutory structure contained in Section 37 of the Act. The Secretary may not choose which of the sections of the Act he will administer and which he will ignore.

G.1. Petitioner's lease is not only a conveyance but a contract as well between the United States and Boesche. Under this court's rulings in the Sinking Fund Cases[11]

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[10] *Noble* v. *Union River Logging R. Co.*, 147 U.S. 165 (1893).

[11] 99 U.S. 700. 719 (1878).

"The United States are as much bound by their contracts as are individuals."

2. Upon issuance of the lease to Boesche, he became vested with a right of property which could be divested only by the judgment of a court, after judicial proceedings. Unilateral cancellation of the Boesche lease by the Secretary in *ex parte* administrative proceedings would be an attempt to deprive the petitioner of his property without due process and is therefore void. *Noble* v. *Union River Logging R. Co.*, 147 U.S. 165 (1893).

H.1. Assertion of Secretarial authority to cancel leases seriously impairs the practical operation of the Mineral Leasing Act. For it imposes upon the oil and gas industry already subject to extensive operational hazards, the additional hazard of uncertain lease titles.

ARGUMENT

The Mineral Leasing Act of 1920 [12] was the product of more than six years of active consideration by the Congress [13] during the course of which public hearings were held [14] and extensive debate was had on the floors of the House and Senate. The Act was an expression of a new congressional policy of overhauling the inadequate placer mining laws which provided for the alienation and patenting of Federal minerals and supplanting them with a Federal leasing system.[15]

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[12] 41 Stat. 437; 30 U.S.C. 181.

[13] House Report No. [illegible] (66th Cong. 1st Sess.), p. 12.

[14] Hearings before the Committee on Public Lands, Government Printing Office, 1918.

[15] House Report No. 563 (65th Cong. 2d Sess.) pp. 8-13, 39-40.

A. The Secretary of the Interior Has No Authority Under the Mineral Leasing Act To Cancel Leases Administratively for Failure To Comply With a Departmental Regulation

1. The Secretary of the Interior has no authority under the Mineral Leasing Act of 1920 to cancel Petitioner's lease administratively for alleged failure to comply with a Departmental regulation. Section 31 of the Act in its original form expressly provided that cancellation of leases should be by court proceedings in a United States District Court for the district in which the land or any part thereof is located.

The text of the Section 31 in its original 1920 form reads as follows

> "Sec. 31. Except as otherwise herein provided, any lease issued under the provisions of this Act may be forfeited and canceled by an appropriate proceeding in the United States District Court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of this Act, or the lease, or of the general regulations promulgated under this Act and in force at the date of the lease; and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions, thereof. (Feb. 25, 1920, c. 85 § 31, 41 Stat. 450, 30 U.S.C. 188.)."

2. Section 31 of the Act, as amended in 1946, conferred limited authority on the Secretary to cancel leases upon failure of the lessee to comply with any of the provisions of the lease.

The text of this 1946 amendment to Section 31 reads as follows:

> "Any lease issued after August 21, 1935, under the provisions of Section 17 of this Act shall be subject to cancellation by the Secretary of the Interior after 30 days' notice *upon the failure of the lessee to*

comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas . . ., Aug. 8, 1946, c. 916, §9, 60 Stat. 956, 30 U.S.C. 188." (Emphasis supplied)

Thus, Section 31, as amended, specifically provides two distinct procedures for forfeiture and cancellation of oil and gas leases, one judicial and the other administrative. And, Congress expressly limits the authority of the Secretary to cancel a lease administratively to instances when there has been a "failure of the lessee to comply with any of the provisions of the lease * * *." Congress decreed that the cancellation of a lease for any other cause must be by judicial proceedings brought in the United States district court as provided in the original form of Section 31, supra.

Thus, it is seen that cancellation by judicial proceedings was the only method of cancellation authorized by the Congress until 1946, when Congress saw fit to add the second paragraph to Section 31 (60 Stat. 956, 30 U.S.C. 188) authorizing the Secretary to cancel a lease administratively where the lessee fails to comply with lease provisions. The Congressional intent to limit the cancellation authority of the Secretary to instances where there has been a breach of lease provisions by the lessee is clear and explicit.

3. There was no violation by Boesche of any of the lease provisions. Moreover, the Secretary's authority to cancel for violation of lease provisions may only be exercised "until the land covered by any such lease is known to contain valuable deposits of oil or gas." In this connection, it should be noted that on May 29, 1959, the Director of the Geological Survey informed the Manager of the Santa Fe Land Office that the land in the Boesche lease was within a known geological structure. The Secretary's order, dated August 5, 1959 to cancel the Boesche lease

is more than two months too late. An attempt to cancel the Boesche lease, if only for this reason is contrary to this express provision of the 1946 amendment of Section 31 of the Act.

4. Had Congress intended that the Secretary have authority to cancel leases administratively, it would have expressly provided for such authority, as it did in Section 26 of the Act with respect to prospecting permits. For in Section 26, Congress provided:

> "That the Secretary of the Interior shall reserve and may exercise the authority to cancel any prospecting permit upon failure by the permittee to exercise due diligence in the prosecution of the prospecting work in accordance with the terms and conditions stated in the permit. . ."

B. The Legislative History of the Act Shows a Clear Congressional Intent That Cancellation of Leases Should Be Accomplished By Court Proceedings

1. The legislative history of the Mineral Leasing Act of 1920 clearly shows that Congress intended that cancellation and forfeiture of leases should be accomplished by judicial proceedings in a United States district court. This was the understanding not only of both Chairmen of the House and Senate Public Land Committees, but also of the then Secretary of the Interior.

In a letter dated January 3, 1916,[16] the then Secretary of the Interior, Franklin K. Lane, reported to the House Committee on Public Lands on the mineral leasing bill then under consideration as follows:

> "Section 26 provides for appropriate forfeiture *but safeguards the interests of the lessee by requiring such proceedings to be in the United States Court for the district in which the lands or deposits are situate.*" (Emphasis supplied)

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[16] House Report No. 206 (65th Cong. 2d Sess.) at p. 8. House Report No. 563 (65th Cong. 2d Sess.) at p. 23.

This statement by Secretary of the Interior Lane is noteworthy not only because he acknowledged that proceedings for cancellation of leases were required by this legislation to be in the United States Court for the district in which the lands or deposits were located but because of the observation that this requirement was designed to safeguard "the interests of the lessee".

Along the same lines we find the following comments of Senator Lenroot and Senator Smoot, chairman of the Senate Committee on Public Lands, appearing at 58 Congressional Record, p. 4168:

> "Mr. Lenroot. I should like to suggest to both Senators that the Secretary of the Interior has no right or authority under the bill to cancel a lease. It can only be canceled by judicial procedure and a forfeiture . . ."

Senator Lenroot's statement was followed immediately by Senator Smoot's concurring view as follows:

> "Mr. Smoot. There is no doubt in the world that this is true."

The legislative history further discloses that an attempt was made by Representative Anderson on the floor of the House of Representatives to amend S. 2775, which subsequently passed and became the Mineral Leasing Act of 1920, so that leases could be cancelled and forfeited without court proceedings. In this connection the following colloquy between Representative Anderson and Representative Sinnott, then Chairman of the House Public Lands Committee, appears at 58 Congressional Record at p. 7604:

> "Mr. Anderson. Mr. Chairman, I move to strike out the last words. I want to ask the chairman of the committee a question. The provision beginning on line 6, page 6, provides:
>
> > 'Any interests held in violation of this act shall be forfeited to the United States by ap-

propriate proceedings instituted by the Attorney General'

"And so forth.

"I take it that under the language the holding is valid and any operations conducted under it would be valid until after action is brought by the United States. Am I correct in my construction of that language?

"Mr. Sinnott. That would relate to a lease, but not to a permit. The Secretary has certain rights under a permit, but after the permit is merged into a lease, then it will take court action.

"Mr. Anderson. Well, Mr. Chairman, I want to ask what was the reason for that sort of a provision? Ordinarily a lease would be void ab initio, but here you put the entire burden on the Government to proceed to forfeit the lease before anything can be done in the way of showing fraud.

"Mr. Sinnott. It is in recognition of that legal, or equitable, principle that the law abhors a forfeiture, and there must be a showing made in court before the forfeiture can be secured.

"Mr. Anderson. I assume a man could scarcely hold a larger amount of land under this act than the act permits, without knowing it. Therefore it seems to me that it ought to provide that the holding of an amount in excess of the amount permitted by the law should be void from the beginning.

"Mr. Sinnott. Well, a man might inadvertently secure more stock than he is entitled to; and it is in line with all court proceedings in relation to forfeiture.

"Mr. Anderson. I move to insert in line 7, page 66, after the word 'be' the words 'void and shall be'. So that it will read:

> 'Any interest held in violation of this act shall be void and shall be forfeited to the United States.'"

Mr. Anderson's motion was defeated and the bill was enacted into law with the provision requiring court proceedings, remaining intact. One could hardly find a more clear and forceful expression of the Congressional intent than is revealed in these statements.

C. The Secretary's 1930 Construction of the Act Was To the Effect That a Lease Once Granted Was Beyond Recall By the Secretary and Was Only Subject To Cancellation In the Federal Courts.

1. The Secretary's 1930 construction of the Mineral Leasing Act of 1920, in *Melish Consolidated Placer Oil Mining Company* v. *Testerman et al.*, 53 I.D. 205 (Nov. 7, 1930) squarely states that although the Leasing Act confers upon the Secretary full power to determine all questions of law and fact essential to the awarding of leases, "The lease once granted was beyond recall by the Secretary and is only subject to cancellation in the Federal Courts (sec. 31, act of February 25, 1920)."

The headnote in this decision summarizes the Secretary's construction of the Act as follows:

> "The Leasing Act confers upon the Secretary of the Interior full power to determine all questions of law and fact essential to the awarding of leases thereunder, and a lease, once granted, is beyond recall by him; thereafter the department is without jurisdiction to review his action and the lease is subject to cancellation only in the Federal Courts."

The decision itself states in part as follows:

> "It is settled that where, by the terms of an act, the Secretary is required upon an application of the claimant to issue a patent, certify a list, approve a location of right-of-way, make a survey or approve a selection, the Secretary has power to make all determinations of law or fact essential to the performance of the duties specifically imposed, and after issuance of patent or other like instrument, his find-

ing of fact is conclusive in the absence of fraud or mistake, not only upon the department, but upon the courts, though his rulings on matters of law are reviewable in the courts they are not subject to reexamination in the department, and his determinations of fact are conclusive, although there is demonstrable error in the estimation or appreciation of evidence. *West* v. *Standard Oil Co.* (278 U.S. 200, 219), and cases therein cited.

"Under the acts under which the award and lease to Testerman and his co-lessees were granted, the department had full power to determine all questions of fact and law essential in properly making such awards and granting leases pursuant thereto. *The lease once granted was beyond recall by the Secretary and is only subject to cancellation in the Federal Courts (Sec. 31, act of February 25, 1920). Jurisdiction of the Department to review his action in granting ceased.* 53 I.D. 207. (Emphasis supplied)

It would be difficult, indeed, to find a clearer and more unqualified disclaimer of any Secretarial authority to cancel leases administratively after a lease issued, than that made by the Department's 1930 decision in this case.

D. Some Court Cases Reviewed

1. Equally categorical in the denial of any Secretarial authority to cancel leases administratively is the 1931 decision of the United States Court of Appeals for the District of Columbia Circuit in the case of *Bell Oil & Gas Company* v. *Wilbur*, 60 App. D.C. 256, 50 F. 2d 1070, 1071 (1931). There the court held unequivocally that the Secretary had no authority under the Mineral Leasing Act of 1920 to cancel leases administratively, when it stated:

"The Secretary, under the terms of the Act, has no power by his own fiat to cancel these leases. He is required to go into the District Court of the United States to accomplish that result by a proceeding in equity."

2. The 1946 amendment to Section 31 of the Mineral Leasing Act [17] expressly confers a limited authority on the Secretary to cancel leases for failure on the part of the lessee to comply with the lease provisions. That Congress considered it necessary to confer this limited power on the Secretary, some 26 years after enactment of the Mineral Leasing Act, tends to buttress the earlier views of the Secretary in the *Melish* case, *supra*, and those of the Court of Appeals in *Bell Oil & Gas Co.* v. *Wilbur*, *supra*, to the effect that the Secretary had no authority under the Act to cancel leases administratively after the lease had issued.

3. However, the 1955 decision of the Court of Appeals for the District of Columbia Circuit, in *McKay* v. *Wahlenmaier*,[18] expressed the view that the Secretary had the authority and duty to cancel leases administratively for failure to comply with Departmental regulations. In that case, the Secretary found that a Mr. Culbertson had violated the Department's regulations requiring disclosure of his interests as a shareholder in his corporation's federal leases, but the Secretary refused to cancel Culbertson's oil and gas lease. Wahlenmaier filed suit asking the District Court to adjudge Culbertson not a qualified applicant, and to direct the Secretary to cancel the lease issued to Culbertson and to issue the lease to him. The relief was granted, and on appeal, the Court of Appeals affirmed the lower court, holding that the Secretary was bound by his own regulations and that he was "plainly wrong in refusing to cancel the lease . . ." (226 F. 2d at 47). The Court further observed:

> "The Secretary's decision was probably based on confusion as to the nature of the question before him, and misapprehension of his own power and duty to cancel . . . (the) lease . . ."

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[17] Aug. 8, 1946, sec. 9, 60 Stat. 956, 30 U.S.C. 188.

[18] 226 F. 2d 35 (1955).

It is significant that throughout the litigation in the *Wahlenmaier* case, the Secretary never urged the prior precedent of the *Bell Oil & Gas Company* case, *supra*, and for a very good reason. The Secretary had no interest in attacking his oft asserted power to cancel leases, the *Bell* case, *supra*, notwithstanding. The Secretary simply chose not to exercise his asserted power to cancel leases, in the *Wahlenmaier* case. Consequently, the *Wahlenmaier* opinion was issued without benefit of briefs by the parties on the fundamental question of the Secretary's authority to cancel leases.

4. In its opinion of October 3, 1957[19] the Court of Appeals for the District of Columbia, in *Seaton* v. *The Texas Company* and *Snyder* v. *The Texas Company*, implicitly criticized its earlier decision in the *Wahlenmaier* case, *supra*, and categorically denied the Secretary's right to cancel a lease which had already been issued by the Department to a Mr. Dorough. In denying such Secretarial authority the court stated in part:

> "In court the position of the Secretary and Snyder is that the cancellation of Dorough's lease by the Secretary was reasonable and not arbitrary, and, therefore, the District Court could not reach a different conclusion on the merits. A number of cases are cited, including *Ickes* v. *Underwood*, 78 U.S. App. D.C. 396, 141 F. 2d 546. This position presupposes a cancellation within the administrative competence of the Secretary. But we think that Dorough's lease, even if in some manner irregular, had acquired a status which necessitated judicial proceedings for its outright cancellation. Among the powers conferred by Congress upon the Secretary we find none which authorized his action in this case. If it exists it must be implied, for it is nowhere expressed, and the relevant considerations weigh against implying the power.

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[19] This opinion, being unreported, is printed in the appendix at pp. 36-43.

"In the absence of other provision by Congress, and we find none, the controversy was in an area for judicial determination in litigation initiated either by the Secretary or by other parties. It has long been held that once a patent to public land is granted by the United States it may be cancelled only by a court in original proceedings, and not merely on limited judicial review of previous administrative cancellation. *United States* v. *Stone*, 69 U.S. (2 Wall.) 525. *Johnson* v. *Towsley*, 80 U.S. (13 Wall.) 72, 84-87; *Noble* v. *Union River Logging R.R.*, 147 U.S. 165, 176; and cases cited . . . We see no difference in principle here. We need not consider whether Congress could provide otherwise consistently with due process of law. See however, *Noble* v. *Union River Logging R.R.*, *supra*, at p. 176. Congress has not provided otherwise. Congress has provided in 30 U.S.C. Sec. 188, not here applicable, for a judicial and administrative proceeding for cancellation of leases in the circumstances and in the manner there stated. This is persuasive that Congress intended cancellation in other circumstances to be accomplished in a manner usual to the disposition of conflicting claims to the same interests stemming from a common grantor.

"It is our opinion that the lease to Dorough could be cancelled against his will, or that of his assignee, only by judicial proceedings."

Before this opinion was printed, a rehearing was granted and the opinion of the Court was withdrawn and a second opinion substituted therefor. The Court's second opinion, appearing at 256 F. 2d 718 (1958), set aside the Secretary's cancellation of Dorough's lease on the more limited ground that the Secretary's "cancellation was not permissible as valid administrative action". The Court's explanation of the withdrawal of its October 3, 1957 decision appears at 256 F. 2d 721, a portion of which is contained in footnote [20] below:

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[20] "On October 3, 1957, we rendered an opinion that the judgment of the District Court should be affirmed as to the restoration of the lease to Dorough, held now by the Texas Company, on the

5. More recently, the United States Circuit Court of Appeals, Tenth Circuit, held in the case of *Pan American Petroleum Corporation* v. *Ed Pierson, et al.*, 284 F. 2d 649 (1960), that the Secretary has no statutory authority to administratively cancel an oil and gas lease after its issuance except for the lessee's breach of the lease provisions. The Court stated in part, at pages 654 and 655:

> "* * * the Government, by the issuance of the lease, has performed the last act required of it to vest in the lessee the right to explore for, produce, market and sell the oil and gas underlying the lease premises. Similarly, the issuance of a patent is the last act of the government in disposing of the non-mineral lands of the public domain. Upon the performance of this last act, administrative power to annul or cancel ends and judicial power begins. The difference between a patent and an oil and gas lease is no reason for the denial of the power of administrative cancellation of a patent and for the recognition of such power to cancel a lease, unless Congress in the exercise of its authority over the public lands has provided for such administrative cancellation of leases

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ground that it could not be cancelled without judicial proceedings instituted for that purpose. We relied principally upon decisions of the Supreme Court that a patent to land once issued by the United States could be cancelled only by the 'judgment of a court,' citing *Noble v. Union River Logging R.R. Co.*, 147 U.S. 165, 176, 13 S. Ct. 271, 275, 37 L. Ed. 123; *Johnson* v. *Towsley*, 13 Wall. 72, 84-87, 80 U.S. 72, 84-87, 20 L. Ed. 485; *United States* v. *Stone*, 2 Wall 525, 535, 69 U.S. 525, 535, 17 L. Ed. 765; and other cases. The Secretary's petition for rehearing *en banc* was denied, but the court which originally decided the case granted a rehearing and the case has been reargued before us.

"If the cancellation of the Dorough lease was not permissible under the principles laid down in the land patent cases it should be set aside. If cancellation was not permissible as valid administrative action of the Secretary it should be set aside for that reason. We think it was not valid administrative action. This makes it unnecessary to cope with the applicability of the land patent cases, and we accordingly withdraw our opinion of October 3, 1957."

> after issuance. The only provisions of this nature in the Mineral Leasing Act and its amendments of which we are aware, relates to administrative cancellation of non-producing oil and gas leases issued after 1935 for breach of lease provisions, and that has no application here because cancellation is sought for fraud in procurement, not for breach of any lease provisions."

and at p. 655:

> "The Secretary of the Interior has no powers except those granted or necessarily implied from granted powers. * * * The Courts have repeatedly held that he is without power to annul a patent once it has issued. That power is reserved to the courts. In the absence of some statutory provisions giving him the power to annul leases under the Mineral Leasing Act, that power is also reserved to the courts. * * *"

The Secretary's Petition for Writ of Certiorari in the *Pan American* case was denied by this court on May 29, 1961.

6. The "patent" cases of this court, cited by the 10th Circuit in the *Pan American* case, *supra*, and by the October 13, 1957 opinion of the District of Columbia Circuit in the *Texas Company* cases, *supra*, are clearly applicable in principle to the question in this case, because they established a clear line of demarcation between the powers of the Executive branch on the one hand and those of the Judicial branch on the other hand with respect to cancellation and forfeiture of patents and "like instruments".

In *Johnson* v. *Towsley*, 80 U.S. 72 (1871), this court addressed itself to the problem presented by the then existing practice of the Land Department of cancelling patents after they had been issued. The problem was stated by this court as follows:

> "It is very well known that the officers (of the Land Department) do not confine themselves to de-

> termining, before a patent issues, who is entitled to it, but they frequently assume the right, long after the patent has issued and the legal title passed out of the United States, to recall or set aside the patent, and issue one to some other party, and if the holder of the first patent refuses to surrender it, they issue a second . . . If the land officers can do this a few weeks or a few months after the first patent has issued, what limit is there to their power over private rights?" (80 U.S. at p. 84).

This court went on in the case to establish a line of demarcation between the jurisdiction of the executive and the courts as follows:

> "This court has at all times been careful to guard itself against an invasion of the functions confided by law to other departments of the Government, and in reference to the proceedings before the officers entrusted with the charge of selling the public lands it has frequently and firmly refused to interfere with them in the discharge of their duties, either by mandamus or injunction, so long as title remained in the United States and the matter was rightfully before those officers for decision. On the other hand the right of the proper courts to inquire, after title had passed from the Government, and the question became one of private right, whether, according to the established rules of equity and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own, or as trustee for another. And we are satisfied that the relations thus established between the courts and the land department are not only founded on a just view of the duties and powers of each, but are essential to the ends of justice and to a sound administration of the law." (80 U.S. at p. 87).

The view expressed by this court in *Johnson* v. *Towsley*, was further elaborated in *Moore* v. *Robbins*, 96 U.S. 530 (1877), as follows:

> "While conceding for the present, to the fullest extent, that when there is a question of contested right between private parties to receive from the

> United States a patent for any part of the public land, it belongs to the head of the land department to decide that question, it is equally clear that when the patent has been awarded to one of the contestants, and has been issued, delivered and accepted, all right to control the title or to decide on the right to the title has passed from the land office. . . . With the title passes all authority or control of the Executive Department over the land, and over the title which it has conveyed. . . . If fraud, mistake, error or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for cancellation of the deed or reconveyance of the land as to individuals; and if the government is the party injured, this is the proper course." (96 U.S. 532, 533)

In *Noble* v. *Union River Logging R. Co.*, 147 U.S. 165, 176 (1893), this court extended the principle enunciated in *Moore* v. *Robbins*, *supra*, in patent cases, to rights-of-way granted by the Secretary. In this right-of-way case, the court held that once the Secretary determined that the Railroad Company was entitled to a grant of a right-of-way under the applicable statute:

> "The railroad company became at once vested with a right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose. . . . A revocation of the approval of the Secretary of the Interior, however, by his successor in office was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore void. As was said by Justice Grier in *United States* v. *Stone*, 2 Wall. 525, 535: 'One officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act and requires the judgment of a court.' *Moore* v. *Robbins*, 969 U.S. 530."

In *West* v. *Standard Oil Co.* 278 U.S. 200 (1929), the doctrine of the so-called patent cases was deemed to be equally applicable to "like instruments" issued by the Land Department. At 278 U.S. 218-219 this court stated:

"Where by the terms of an act, the Secretary is required upon application of the claimant, to issue a patent, as in *Michigan Land & Lumber Co.* v. *Rust*, 168 U.S. 589, 592; or to certify a list, as in *Frasher* v. *O'Connor*, 115 U.S. 102, 115-116, or to approve a location as in *Noble* v. *Union River Logging R.R.* Co., 147 U.S. 165; or to make a survey and approve a selection, as in *Shaw* v. *Kellogg*, 170 U.S. 312, Congress, by implication, confers upon the Secretary the power to make all determinations of law as well as of fact which are essential to the performance of the duty specifically imposed. *After issue of the patent or like instrument*, his findings of facts are conclusive, in the absence of fraud or mistake, not only upon the Department, but upon the courts, *DeCambra v. Rogers*, 189 U.S. 119; *Love* v. *Flahive*, 205 U.S. 195, 198; and though his rulings on matters of law are reviewable in the Courts, *Doolan* v. *Carr*, 125 U.S. 618, 625; *Wisconsin Central R.R.* v. *Forsythe*, 159 U.S. 46, 61, *they are not subject to re-examination by the Department. Johnson* v. *Towsley*, 13 Wall. 72, 83-84." (Emphasis supplied)

E. In Section 31 of the Act Congress Was Giving Statutory Effect To the Jurisdictional Line of Demarcation Between the Executive and Judicial Branches Established By This Court In the "Patent" Cases.

1. Our nation's history is replete with instances where principles of law formulated by the courts have been subsequently enacted into statutory law by the legislative branch of the government. We have such an instance here. In enacting Section 31 of the Act, providing that forfeiture and cancellation of leases should be accomplished by court proceedings, Congress was giving statutory effect to the jurisdictional line of demarcation between the Executive and Judicial branches already established by this court in the "patent" cases.

F. The Secretary's Assertion of Implied Authority To Cancel Leases Cannot Be Sustained In View of This Court's Holding In *Youngstown* v. *Sawyer*, 343 U.S. 579 (1952).

1. The Secretary's assertion of implied authority under Section 441 of the Revised Statutes of 1875, to cancel leases administratively, the express provision of Section 31 of the Mineral Leasing Act of 1920 notwithstanding, cannot be sustained in view of this court's holding in *Youngstown* v. *Sawyer*, 343 U.S. 579 (1952). In that case, the President issued an Executive Order directing the Secretary of Commerce to seize and operate most of the steel mills, in order to avert a nation-wide strike of steel workers in April 1952, which he believed would jeopardize national defense. The Order was not based on any specific statutory authority but was based generally upon all powers vested in the President by the Constitution and laws of the United States and as President of the United States and Commander-in-Chief of the Armed Forces. The principle enunciated by the Supreme Court in *Youngstown* v. *Sawyer*, in denying the President's "general authority" to order seizure of the steel mills, is equally applicable here. Namely, that while the executive branch may invoke its "general authority" to support a course of action when the statute is silent on the subject, after the Congress has by statute provided specific procedures whereby executive action may be taken, the administrative agency cannot ignore the means provided by the Congress and attempt to achieve the same or similar results by another method of its own choice.

Paraphrasing the remarks of Justice Brandeis in *Wallace* v. *Cutton*, 298 U.S. 229, 237 (1936), "The language of Section . . . (31) is clear and on the face of the statute there can be no doubt concerning the intention of Congress. As was said in *Iselin* v. *United States*, 270 U.S.

245, 250-251. 'The Statute was evidently drawn with care; its language was plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect an enlargement of it by the court, so that what was omitted . . . may be included within its scope. To supply omissions transcends the judicial functions.'"

2. The Mineral Leasing Act of February 25, 1920 was enacted by the Congress "* * * to promote the mining of coal, phosphate, oil, oil shale and gas." Section 37 of this Act specifically provides that "the deposits of coal, phosphate, oil, oil shale and gas * * * *shall be subject to disposition only in the form and manner provided by this act* * * *." (Emphasis supplied). In some thirty-eight sections the Act proceeds to specify comprehensively and in great detail the procedures to be followed by the Secretary in his administration of the Federal Mineral Leasing Program. Included in these sections is Section 31 providing specific judicial procedures governing the concellation of leases issued by the Secretary. The Secretary's assertion of general authority is made despite the express Congressional directive contained in Section 37 of the Mineral Leasing Act to the effect that oil and gas deposits on public lands—"* * * *shall be subject to disposition only in the form* and manner provided by this Act * * *." (Emphasis supplied). In spite of this plain statutory stricture, the Secretary chooses to ignore the specific limitation by the Congress on his authority to cancel leases administratively, and instead he chooses to assert a general authority contained in Section 441 of the Revised Statutes of 1875. If the Secretary may ignore or nullify Section 31 of the Mineral Leasing Act of 1920 as regards his authority to cancel leases and lieu thereof set up his general authority under the 1875 statute, as being more to his liking, why cannot the Secretary by the same rationale ignore or nullify other sections of the Mineral Leasing Act? Is the Secretary within his right to pick and choose which of the sections

of the Mineral Leasing Act of 1920 he will ignore and which he will administer?

The broad power of control and supervision conferred upon the Secretary by Section 441 of the Revised Statutes of 1875 does not clothe him with any discretion to substitute his judgment for the will of Congress as manifested in the Mineral Leasing Act of 1920 (See *West* v. *Standard Oil Co.*, 278 U.S. 200). To read into Section 441, by implication, Secretarial authority to cancel leases administratively for failure to comply with Departmental regulations, would be to create a power contrary to the express intention of Congress which specifically provided under Section 31 of the Mineral Leasing Act of 1920, as amended, that cancellation of leases for failure to comply with Departmental regulations should be by court proceedings in a United States District Court for the district in which the land or any part thereof is located.

G. Issuance of the Lease To Boesche Bound the Secretary In Contract and Vested Petitioner With a Property Right Which Could Be Divested Only By Judgment of a Court

1. The Department of the Interior as the lessor of oil and gas leases is operating in a proprietary capacity. The magnitude of this proprietary business is reflected in two 1962 Press Releases issued by the Department. On January 24, 1962 the Bureau of Land Management issued a Press Release to the effect that the anticipated receipts from public lands for Fiscal Year 1962 are estimated at $383,000,000. Again in a Press Release dated March 23, 1962, the Interior Department reported that it had received off-shore oil bids totalling $445,835,000. Thus in these two items alone we are talking about Federal leasing income for Fiscal Year 1962 exceeding three-quarters of a billion dollars. These are amounts which grow out of the Department's contractual relations. Any

one who has had any experience dealing with the Department of the Interior would attest to the fact that the Department will zealously collect every single dollar to which the public treasury has been entitled to by contract, and justly so. But contractual benefits as we well know carry with them correlative obligations, which the Government, when it is acting in a proprietary capacity, is duty bound to fulfill.

Petitioner herein proceeds on the basic premise that the subject lease besides being a conveyance is also a contract between the United States and himself for the use of property and that with respect to such contract the Government is as much bound by it as is the individual party thereto. This principle has been enunciated time and again by this Court. As this Court stated in the *Sinking Fund Cases*:[21]

> "The United States are as much bound by their contracts as are individuals. If they repudiated their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator has been a State or municipality or a citizen."

In *Reading Steel Casting Company* v. *United States*[22] which was a case involving a contract to furnish steel castings to the Marine Corps, the principle was reiterated by the Supreme Court when it said:

> "The contract is to be construed and the rights of the parties are to be determined by the application of the same principles as if the contract were between individuals."

And in *Lynch* v. *United States*,[23] the Supreme Court said:

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[21] 99 U.S. 700, 719 (1878).

[22] 268 U.S. 186, 188 (1925).

[23] 292 U.S. 571, 579 (1934).

> "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

Applying this principle specifically to oil and gas leases, the United States District Court for the Southern District of California, in the case of *United States* v. *General Petroleum Corporation*,[24] stated:

> "In resolving the foregoing isues it must be remembered that the (Federal) Government's role is taken to be no different from that of any private lessor or proprietor, for while the Kettleman Hills lands involved are public mineral lands, and as such until their disposition are under the supervision and control of Congress, the Government as to such lands acts in a proprietary capacity, and treats with them in the same way as does the private landowner. Regardless of the type of lease Congress might authorize, a lease executed in accordance with what it *has* authorized becomes a private contractual matter and is to be interpreted according to the general rules of law respecting contracts between individuals."

Thus, we find the courts generally expressing the view that contracts, including leases, entered into between the United States and individuals are subject to the same general rules of law that apply to contracts between private parties.

The Department issued a lease to Petitioner Boesche. Petitioner Boesche has fulfilled his lease obligations and has every right to expect that the Department will likewise honor its obligations.

2. Upon issuance of the lease to Boesche, he became vested with a right of property which could be divested only by the judgment of a court, after judicial proceedings. Unilateral cancellation of the Boesche lease by the Secretary in *ex parte* administrative proceedings would

[24] 73 F. Supp. 225, 234 (1947) affirmed 184 F. 2d 802.

be an attempt to deprive the petitioner of his property without due process and is therefore void. *Noble* v. *Union River Logging R. Co.*, 147 U.S. 165, 176 (1893).

H. Assertion of Secretarial Authority To Cancel Leases Seriously Impairs the Practical Operation of the Act.

1. In discussing the practical consequences of the Secretary's asserted authority to cancel leases administratively, Judge Breitenstein in the *Pan American* case, *supra*, stated, in part at 284 F.2d 655:

> "If there may be administrative cancellation of an oil and gas lease . . . the practical operation of the Mineral Leasing Act is seriously impaired. It is common knowledge that exploration for oil and gas is costly. The drilling of wells requires substantial financial risks and the expense of putting those wells on production and of marketing the product is burdensome. If continued existence of the granted leasehold estate is dependent upon the fluctuating policies of governmental departments uninhibited by any limitations upon time of action, the value of federal oil and gas leases as a title basis for oil and gas development is greatly diminished if not practically destroyed. No prudent operator would be willing to accept the financial risks if he were subject to ouster because of some administrative decision based upon improper conduct of an assignor occurring at some distant time in the past." (citing cf. *Moore* v. *Robbins*, *supra*, 96 U.S. at page 534.)

The requirement of court proceedings in a United States District Court for cancellation and forfeiture of leases for failure to comply with Departmental regulations is clear and explicit in the language of Section 31 of the Mineral Leasing Act. To permit the Secretary to cancel leases in such circumstances would not only be contrary to Congressional mandate, but it would as well impose upon the oil and gas industry, already burdened with great operational hazards, the additional hazard of uncertain lease titles.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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December, 1962

APPENDIX

The pertinent provisions of the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, as amended, are as follows:

Sec. 26. "That the Secretary of the Interior shall reserve and may exercise the authority to cancel any prospecting permit upon failure by the permittee to exercise due diligence in the prosecution of the prospecting work in accordance with the terms and conditions stated in the permit . . ." (30 U.S.C. 183)

Sec. 31. "That any lease issued under the provisions of this act may be forfeited and canceled by an appropriate proceeding in the United States district court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of this act, of the lease, or of the general regulations promulgated under this act and in force at the date of the lease; * * *".

The Act of August 8, 1946, 60 Stat. 956, in section 9, thereof, amended section 31 of the Mineral Leasing Act of 1920, by adding at the end thereof, the following:

> "Any lease issued after August 21, 1935, under the provisions of Section 17 of this Act shall be subject to cancellation by the Secretary of the Interior after 30 days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas . . ." (30 U.S.C. 188).

Sec. 37. "That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals . . . shall be subject to disposition only in the form and manner provided in this act . . ." (30 U.S.C. 193)

Section 441 of the Revised Statutes (1875) provides in pertinent part:

"Sec. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

* * * *

Second. The public lands, including mines."

43 CFR 192.42(d), under the heading "Noncompetitive Leases—Offer to lease and issuance of lease." provides in pertinent part:

"(d) * * * Each offer must be for an area not more than 2,560 acres except where the rule of approximation applied, and may not be for less than 640 acres except in any one of the following instances:

(1) * * *

(2) Where the land is surrounded by lands not available for leasing under the Act, * * *."

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13636

FRED A. SEATON, individually and as Secretary of the Interior, APPELLANT

v.

THE TEXAS COMPANY, APPELLEE

No. 13637

JOHN SNYDER, APPELLANT

v.

THE TEXAS COMPANY, APPELLEE

Appeals from the United States District Court for the District of Columbia

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Decided October 3, 1957

Mr. Roger P. Marquis, Attorney, Department of Justice, with whom Mr. S. Billingsley Hill, Attorney, Department of Justice, was on the brief, for appellant in No. 13636.

Mr. James R. Browning for appellant in No. 13637.

Mr. John J. Wilson, with whom Messrs. Roger J. Whiteford and Philip S. Peyser were on the brief, for appellee.

Before Bazelon, Fahy and Burger, Circuit Judges.

FAHY, CIRCUIT JUDGE: The Secretary of the Interior and John Snyder appeal from a judgment of the District

Court that appellee The Texas Company, assignee of Thomas G. Dorough, is the holder of a valid oil and gas lease on forty acres of land in North Dakota and that Snyder should surrender for cancellation a lease to him on the same acreage.[1]

Dorough applied April 19, 1948, for a noncompetitive oil and gas lease on some 2000 acres, including the forty acres in question. His application was made pursuant to the Mineral Leasing Act of 1920, 41 Stat. 437, as amended, 30 U.S.C. § 181 (1952), and was filed with the Bismarck, North Dakota, district land office of the Bureau of Land Management, Department of the Interior. The Act of 1920 authorizes the leasing of "public domain lands," and for purposes of an oil and gas lease the forty acres were of that character. By letter of January 25, 1949, however, the regional office of the Bureau at Billings, Montana, informed Dorough that most of the land covered by his application, including the forty acres, was "acquired land" and not public domain land. "Acquired land" is not in terms authorized to be leased under the Act of 1920, and furthermore, an application for a lease on land of that character should be made with the Washington office of the Bureau. Dorough, in reply to the letter of January 25, asked the regional office to forward his application to Washington, "with a request that it be treated as an application for an oil and gas lease on acquired lands, thus retaining its filing time and date priority. On December 1, 1951, the United States, through the Bureau, issued to Dorough an oil and gas lease on this land, denominated a "Lease of Oil and Gas Lands Under the Act of August 7, 1947." That Act, 61 Stat. 913, 30 U.S.C. § 351 (1952), in terms authorizes the leasing only of acquired land.

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[1] The forty acres are described as follows: NE¼ SW¼ of Section 7 in Township 153 N., Range 95W., 5th Principal Meridian, McKenzie County, North Dakota.

Previous to the lease to Dorough, but after his application, Snyder filed with the Bureau of Land Management in Washington an application for an oil and gas lease on the same forty acres as well as on other land, all as public domain land and "pursuant and subject to" the Act of 1920. His application was transmitted to the office at Billings, Montana. It was at first rejected as to the forty acres in question but this action was revoked upon a showing that those acres were in fact public domain land. On April 24, 1953, a lease that had been issued to Snyder under the 1920 Act, was amended to include the forty acres, thus giving Snyder a lease to the same land and under the same Act as Dorough had originally sought for himself. The Bureau found that when the United States had issued a land patent on these forty acres in 1940 it had reserved the oil and gas rights. The land had been reconveyed to the United States two years later, but the oil and gas had remained at all times part of the public domain and were not "acquired."

On February 16, 1954, the Chief, Division of Minerals of the Bureau, at the request of Snyder, and without notice to Dorough, cancelled the lease to Dorough of December 1, 1951, on the ground that it had been erroneously issued under the Act of 1947, which was not available for the leasing of public domain land. On appeal to the Secretary of the Interior, taken by The Texas Company and Dorough, the Bureau decision was affirmed on the grounds hereinafter stated.[2] The Texas Company thereupon filed its complaint in the District Court. The parties there stipulated that the court should determine whether the Texas Company or Snyder holds the valid lease on the forty acres, except that "the stipulation was not to apply in the event that the Court's decision was based upon a finding that the purported cancellation of

[2] Dorough also petitioned for reinstatement of his lease, which was denied.

plaintiff's lease was not effective because of the lack of a judicial proceeding." The District Court ordered the Secretary to restore the lease to The Texas Company and directed Snyder to surrender his lease for cancellation by the Secretary. We affirm as to the restoration of the lease to "The Texas Company on the ground that judicial proceedings were essential to cancellation of the lease to Dorough, The Texas Company's assignor.

Dorough's original application, as we have seen, was filed under the proper statute, the Act of 1920. But the Secretary ruled that when the regional office by its letter of January 25, 1949, mistakenly informed Dorough that the forty acres were not public domain land but acquired land which could not be leased on his application made pursuant to the 1920 Act, and Dorough then asked the regional office to forward his application to Washington to be treated as an application for a lease on acquired lands, which was done, thereafter "Dorough's only valid application for the disputed tract was . . . an acquired land application filed in accordance with the pertinent regulations . . . with the Bureau of Land Management in Washington," while Snyder's application, though filed after Dorough's, was in proper form for public domain land. In this situation the Secretary ruled that Dorough's application "was not a proper one and failed to earn him the preference right to a public land oil and gas lease," and Snyder became the first qualified applicant with a proper application. See 30 U.S.C. § 226 (1952).

In court the position of the Secretary and Snyder is that the cancellation of Dorough's lease by the Secretary was reasonable and not arbitrary, and, therefore, the District Court could not reach a different conclusion on the merits. A number of cases are cited, including Ickes v. Underwood, 78 U. S. App. D. C. 396, 141 F.2d 546. This position presupposes a cancellation within the administrative competence of the Secretary. But we think that

Dorough's lease, even if in some manner irregular, had acquired a status which necessitated judicial proceedings for its outright cancellation. Among the powers conferred by Congress upon the Secretary we find none which authorized his action in this case. If it exists it must be implied, for it is nowhere expressed. And the relevant considerations weigh against implying the power. The Secretary leased the forty acres to Dorough under the 1947 Act after Dorough had been advised, though no doubt erroneously, that his application under the 1920 Act was under the wrong Act. No other application preceded his. Seventeen months after leasing to Dorough the Secretary leased exactly the same land to Snyder, but under the 1920 Act. Ten months passed and then at Snyder's request a division chief, without notice to Dorough, cancelled Dorough's lease, action which was affirmed administratively by the Secretary after appeal to him and a hearing. The courts are asked to hold that this action cannot be set aside except for arbitrariness, and that in determining the question of arbitrariness the factual findings of the Secretary cannot be disturbed at all. We are not justified in implying the existence of such a method for disposing of the matter. In the absence of other provision by Congress, and we find none, the controversy was in an area for judicial determination in litigation initiated either by the Secretary or by other parties. It has long been held that once a patent to public land is granted by the United States it may be cancelled only by a court in original proceedings, and not merely on limited judicial review of previous administrative cancellation. United States v. Stone, 69 U.S. (2 Wall.) 525;[3]

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[3] In this case the Court said:

> Patents are sometimes issued unadvisedly or by mistake, where the officer has no authority in law to grant them or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence of a grant, and the

Johnson v. Towsley, 80 U.S. (13 Wall.) 72, 84-87; Noble v. Union River Logging R.R., 147 U.S. 165, 176; and cases cited;[4] Chandler v. Calumnet and Heda Mining Co., 149 U.S. 79;[5] Burke v. Southern Pac. R.R., 234 U.S. 669, 692, 710; and see Witbeck v. Hardeman, 51 F.2d 450, 452 (5th Cir.); Lane v. Watts, 234 U.S. 525, 540, affirming Lane v. Watts, 41 App. D.C. 139; United States v. Bell Tel. Co., 128 U.S. 315, 365; Ickes v. Fox, 300 U.S. 82. We see no difference in principle here. We need not con-

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officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court.

[4] There was jurisdiction in the Secretary to have issued the lease originally to Dorough, notwithstanding he did so mistakenly under the 1947 Act rather than the 1920 Act. See Noble v. Union River Logging R.R., supra, at 176. In other words, the mistake was not a jurisdictional one.

[5] This case is of special interest. Defendant claimed title through an 1855 patent issued under an 1852 Act of Congress providing for the grant of land to Michigan to finance a canal. Plaintiff claimed through an 1887 patent which he contended was issued under an 1850 Act of Congress providing for grant of land for swamp drainage. Plaintiff attempted to prove by oral testimony that the land in question was in fact swamp land. The Court excluded this evidence, but went on to say that assuming the evidence were competent, that the land were swamp, and that

> the State, in patenting the demanded premises to the canal company, acted under mistake or misapprehension as to the character of the land so conveyed, still so long as that patent remains uncancelled and unrevoked by the State, it must be held that its legal effect was and is to pass whatever title the State had to the tract in question, however that title may have been originally acquired by the State.
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> It is well settled that the State could have impeached the title thus conveyed to the canal company only by a bill in chancery to cancel or annul it, either for fraud on the part of the grantee, or mistake or misconstruction of the law on the part of its officers in issuing the patent, and until so cancelled or annulled it could not issue to another party any valid patent for the same land.

sider whether Congress could provide otherwise consistently with due process of law. See, however, Noble v. Union River Logging R.R., supra, at p. 176. Congress has not provided otherwise. Congress has provided in 30 U.S.C. § 188, not here applicable, for a judicial and an administrative proceeding for cancellation of leases in the circumstances and in the manner there stated. This is persuasive that Congress intended cancellation in other circumstances to be accomplished in a manner usual to the disposition of conflicting claims to the same interests stemming from a common grantor.

We think McKay v. Wahlenmaier, 96 U.S. App. D.C. 313, 226 F.2d 35, does not decide that administrative cancellation was available to the Secretary in the present case. There we held that the Culbertson lease should be cancelled, and ordered the Secretary to cancel it. We did say also that the Secretary could have cancelled in the situation there presented, but the fact is the cancellation was ordered by the court as the result of a judicial proceeding, and not on review of administrative cancellation. In Call v. Richfield Oil Corp., 101 F. Supp. 972 (S.D. Cal.), also relied upon by the Secretary, it seems that the court thought that if a lease were not valid it could be cancelled by the Secretary administratively; but this leaves unanswered the question as to how the question of validity, or of appropriate relief in case of invalidity or irregularity, is first to be adjudicated. Even if we were to assume a measure of invalidity, it would not follow that all rights of the lessee were terminated. In other words, in the circumstances here presented—and we do not deal with all possible situations—the ultimate rights and duties of the parties, including the United States, cannot be so molded initially by administrative corrective action as to be subject only to the limited judicial scrutiny applicable where an administrator acts within his sphere of discretion, as

in United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U.S. 316, and like cases.

It is our opinion that the lease to Dorough could be cancelled against his will, or that of his assignee, only by judicial proceedings. In view of this we affirm the judgment of the District Court insofar as it orders the Secretary to restore the lease to The Texas Company, Dorough's assignee, without prejudice, however, to further proceedings not inconsistent with this opinion, initiated either by the Secretary or by others. Since we do not prejudge the outcome of such proceedings it is necessary to vacate that part of the judgment of the District Court which orders Snyder's lease to be surrendered for cancellation.

It is so ordered.